91-960

Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

KENNETH R. MASTRANDREA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether statutory language from a different subdivision of the statute than the government intended to charge petitioner may be deemed mere surplusage in an indictment when petitioner prepared his defense based upon that language, or if ambiguity in the indictment deprived petitioner of his constitutional right to due process and adequate notice of the charges against him.

PARTIES TO THE PROCEEDING

The parties to the proceeding are as follows:

Kenneth R. Mastrandrea, Petitioner,

and

United States of America, Respondent.

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OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at United States v. Mastrandrea, 942 F.2d 1291 (8th Cir. 1991) and is reprinted in Appendix A. The order denying rehearing is reprinted in Appendix B. An Order and Memorandum filed by the District Court for the District of Minnesota on the issue raised in this petition is reprinted in Appendix C.

JURISDICTION

The final judgment of the Eighth Circuit Court of Appeals denying petitioner's request for rehearing was filed October 15, 1991. Appendix B. This petition was filed within ninety days of that date. This Court's jurisdiction is invoked under Title 28 United States Code Section 2101(d).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . ..

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ..

Title 18 United States Code Section 2314 provides in part as follows:

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of

$5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $5,000 or more; or
>
> . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

Kenneth R. Mastrandrea stood trial in the United States District Court for the District of Minnesota, the Honorable Paul A. Magnuson presiding, on eight charges of interstate transportation of stolen property, in violation of Title 18 United States Code Section 2314. Mr. Mastrandrea's conduct while serving as president of Firstours, a wholesale travel company, was not materially disputed. As the Eighth Circuit of Appeals noted, Mr. Mastrandrea "obtained company funds to which he was not entitled either by writing company checks to himself or by directing others to do so. He then deposited the checks, which were drawn on banks in California and Illinois, in his Minnesota bank account. To conceal the misappropriation, he directed Firstours's bookkeeper to falsify company records." 942 F.2d at 1292 (A-2 herein).

The indictment charged Mr. Mastrandrea in each of the eight counts of interstate transportation of stolen property as follows:

> For the purpose of executing the aforesaid scheme and artifice to defraud [defendant] did knowingly cause to be transported in interstate commerce, through normal banking channels . . . check number [xxx]. . . . All in

violation of Title 18 United States Code Sections 2314 and 2.

Petitioner's defense was that the misappropriated checks did not travel in interstate commerce in furtherance or execution of a scheme or artifice to defraud, but rather the fraud was complete when the checks were deposited in his account. This defense parallels a cognizable defense to violations of the mail fraud statute, Title 18 United States Code Section 1341. See United States v. Maze, 414 U.S. 395, 400 (1974); Kahn v. United States, 323 U.S. 88, 94 (1944)(government must prove mailing furthered a scheme or artifice to defraud).

Petitioner prepared his defense upon a belief that he was charged with violation of the second paragraph of Title 18 United States Code Section 2314. The government's prosecutor contended that petitioner was charged under the first paragraph of Section 2314 which makes no mention of furthering a scheme or artifice to defraud.

The interstate transportation of stolen property statute (18 U.S.C. § 2314) may be violated in one of five ways. Separate violations are contained in five unnumbered paragraphs of the statute. The first two unnumbered paragraphs are as follows:

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $5,000 or more; or
>
> . . .

Following the government's opening statement, defense counsel moved for judgment of acquittal on the ground that the government's proposed evidence would not support a conviction under the second paragraph of the statute. The government's prosecutor then announced for

the first time its position that petitioner was charged under the first paragraph of the statute.[1]

Defense motions for judgment of acquittal after opening statements and at the close of the government's case were denied. The district court found the statutory language concerning furtherance of a scheme or artifice to defraud as "mere surplusage." See Memorandum and Order dated January 17, 1990 (Appendix C - p. A-16). The Eighth Circuit Court of Appeals adopted the district court's finding of mere surplusage and affirmed petitioner's conviction.

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[1] The government's prosecutor had previously submitted a proposed jury instruction (number 19) quoting the second paragraph of section 2314 (reproduced in Appendix D).

REASONS WHY REVIEW SHOULD BE GRANTED

The Eighth Circuit Court of Appeals ignored the longstanding constitutional requirement that a person must not be required to answer or defend against criminal charges without a clear idea of the nature of the charges against him.

In Mr. Mastrandrea's case, counsel for the litigants began trial under different perceptions of the charges upon which the defendant was standing trial. In footnote number 4, the Eighth Circuit Court of Appeals noted that,

> The government was possibly confused about the statutory provision. Before trial, the government submitted a proposed jury instruction which quoted the language from the second paragraph of section 2314 . . . [t]he government apparently became aware of the proper provision sometime before trial. The government's apparent confusion, while adding strength to Mastrandrea's argument does not affect the validity of the indictment.

942 F.2d at 1293 n.4. See also Appendix D - Government's Proposed Jury Instruction No. 19.

The finding by the Eighth Circuit that even the prosecutor was confused well establishes the ambiguous

nature of the indictment. At the close of the government's case, in response to Mr. Mastrandrea's motion for judgment of acquittal on the ground that the government had not proven a violation of the section 2314, the prosecutor responded, "The government admits that at an earlier stage an error was made in providing the wrong language for the applicable statute in Government's Requested Instruction No. 19." (trial transcript, Vol. III, page 44).

Based upon repeated mention of furtherance of a scheme or artifice to defraud, petitioner reasonably prepared to defend against that allegation. A fair reading of the indictment clearly shows that the charges were ambiguous at best. The lower court erroneously concluded that the prosecution's confusion was inconsequential. This factor not only strengthens Mr. Mastrandrea's argument, it solidly confirms the ambiguity.

The Eighth Circuit Court dismisses petitioner's claim that the confusing nature of the indictment violated his due process rights by finding, "Mastrandrea had notice at the time of opening statements that the government was proceeding under section one of 2314." 942 F.2d at 1294. Notice of the prosecutor's intended charges at this juncture, after the jury was impanelled and jeopardy attached, was not timely notice of the charges against him, particularly

when Mastrandrea prepared his defense in reliance upon statutory language in the indictment, which language the prosecutor also relied upon until some unspecified time before trial.

The Eighth Circuit Court found the contested language in the indictment "mere surplusage" but completely overlooked the fact that the "surplusage" was statutory language from a provision of the same statute under which the government contended the grand jury charged petitioner. For that reason, the Eighth Circuit's reliance on the single case from its own circuit, United States v. Brown, 604 F.2d 557 (8th Cir. 1979), is inapposite.

In Brown, the appellant claimed that the lower court's jury instructions on conspiracy were deficient because they did not contain all the allegations contained in the indictment. The Brown Court held that allegations not essential to prove the charge are mere surplusage. Unlike the instant case there was no claim in Brown that the surplus allegations contained statutory language or lead to any confusion regarding the statutory provision under which the accused was charged. Statutory language has far more sanctity than additional verbiage in an indictment.

This Court has repeatedly held that an indictment is sufficient if it, first, contains the elements of the offense

charged and fairly informs the defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions from the same offense. Hamling v. United States, 418 U.S. 87, 117 (1974); Russell v. United States, 369 U.S. 749, 763-64 (1962). Indictments are generally considered sufficient if the words of the statute are followed as long as, "those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." United States v. Carll, 105 U.S. 611, 612 (1882)(emphasis added). This principle is deeply rooted in American jurisprudence. See United States v. Cook, 17 Wall 168 (1872)("[I]t is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed.").

Crimes must be charged with precision and certainty. Evans v. United States, 153 U.S. 584, 587 (1894). Even an indictment that follows statutory language may be defective if the defendant is not adequately apprised of the accusation against him. United States v. Simmons, 96 U.S. 360, 362 (1877). In this case statutory language was followed, the accused relied upon it to prepare his defense but the trial court accepted the government's last minute

interpretation of the statutory language as surplusage, disregarding the defendant's reliance upon it in trial preparation. The irregularity in the indictment in Mr. Mastrandrea's case was not a mere technical deficiency. See Smith v. United States, 360 U.S. 1, 9 (1959)(technical deficiency will not warrant reversal but substantial safeguards to those charged with serious crimes cannot be eradicated under guise of technical departure from the rules).

Mr. Mastrandrea requested that the trial court instruct the jury that an essential element of the charge was that the act or acts of causing the transportation of the checks in interstate commerce was for the purpose of executing the scheme or artifice to defraud. By failing to instruct the jury on this element the trial court constructively amended the indictment and allowed the jury to convict appellant of offenses different from those alleged in the indictment. An actual or constructive amendment of an indictment is reversible error per se. An amendment of the indictment occurs when the essential elements of the offense set forth in the indictment are altered, either actually or in effect, by the prosecutor or the court after the Grand Jury has passed upon them. See Stirone v. United

States, 361 U.S. 212 (1959); United States v. Johnson, 713 F.2d 633, 643 (11th Cir. 1983).

In Stirone, this Court reversed the appellant's conviction where a variance in the indictment and the proof at trial was held to have "destroyed the defendant's substantive right to be tried only on charges presented in an indictment returned by a Grand Jury." In Stirone the trial court's jury instructions broadened the elements of the offense allowing the jury to convict on a finding of either of two theories of interference of interstate commerce.

The Stirone Court followed the precedent set in Ex parte Bain, 121 U.S. 1 (1887) that the right to have the Grand Jury make the charges is a substantive right that cannot be taken away without court amendment. In Bain, the trial court narrowed the charges in the indictment by ordering that some allegations in the indictment be stricken. In granting Bain a writ of habeas corpus, the Supreme Court stated:

> If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the Grand Jury would probably have made it if their attention had been called to suggested changes, the great

importance which the common law attaches to an indictment by a Grand Jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer' may be frittered away until its value is almost destroyed."
121 U.S. at 10.

Mr. Mastrandrea reasonably believe he was charged with violation of the second paragraph of section 2314. If he was not so charged, the ambiguity within the indictment caused him to be misguided as to the precise nature of the charges against him and as such violated his right to adequate notice and due process as guaranteed by the fifth and sixth amendments of the United States Constitution. U.S. Const. amends. V and VI; Stirone v. United States, 361 U.S. 212 (1959); see United States v. Haldeman, 559 F.2d 31, 123 (D.C. Cir. 1976) cert. denied; Ehrlichman v. United States, 431 U.S. 933 (1977), reh'g denied 433 U.S. 913 (1977).

The holding of the Eighth Circuit Court of Appeals in this case violates those constitutional principles that due process mandates that an accused must be fairly and accurately informed of the charges against which he or she must defend (Amendment VI) and that no charges be issued except by grand jury indictment (Amendment V).

The government's prosecutors in this case attempted to act as a surrogate to the grand jury by postulating on the precise provision of Section 2314 that was contemplated at the time the indictment was issued. Neither the prosecutor nor the trial court were privileged to amend the grand jury's charges to alleviate the ambiguities.

CONCLUSION

Further review of the Eighth Circuit Court of Appeals's decision in this case is warranted to correct a manifest injustice and to establish that statutory language may not be considered mere surplusage when it leads to ambiguity in the charges.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 90-5332

United States of America, Appellee, v. Kenneth R. Mastrandrea, Appellant.	* * * * * * * * *	Appeal from the United States District Court for the District of Minnesota.

Submitted: February 11, 1991
Filed: August 26, 1991

Before MAGILL, BEAM, and LOKEN, Circuit Judges.

BEAM, Circuit Judge.

Kenneth R. Mastrandrea was convicted, following a jury trial, on eight counts of interstate transportation of stolen property. See 18 U.S.C. 2314 (1988). On appeal,

he argues that the district court[1] erred in not granting his motion for acquittal because the government failed to prove all the elements of the offenses. He also contends that the indictment was vague and failed to give him adequate notice of the charges against him. We affirm.

Mastrandrea does not dispute the underlying facts and only a brief recitation is necessary. Mastrandrea was president of Firstours, Inc., a wholesale travel agency. In this capacity, he obtained company funds to which he was not entitled either by writing company checks to himself or by directing others to do so. He then deposited the checks, which were drawn on banks in California and Illinois, in his Minnesota bank account. To conceal the misappropriation, he directed Firstours's bookkeeper to falsify company records.

The grand jury returned an indictment alleging generally that Mastrandrea devised a scheme and artifice to defraud his employer of money, by inter alia, drafting company checks without authority and depositing them in his personal bank account. Each count of the indictment on which Mastrandrea was convicted realleges the general allegations and alleges a specific check number and amount

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[1]The HONORABLE PAUL A. MAGNUSON, United States District Judge for the District of Minnesota.

of money.[2] For example, Count IV alleges:

> On or about January 10, 1986, in the State and District of Minnesota and elsewhere, the defendants,
>
> KENNETH R. MASTRANDREA and
>
> MILTON H. SERGEANT,
>
> each aiding and abetting the other, for the purpose of executing the aforesaid scheme and artifice to defraud, did knowingly cause to be transported in interstate commerce, through normal banking channels, Firstours' check number 22194 in the amount of $5,000, drawn on the Security Pacific National Bank of Los Angeles, California, which check was deposited in an account in the name of Kenneth R. Mastrandrea at the Norwest Bank Metrowest, Hopkins, Minnesota, all in violation of Title 18, United States Code, Sections 2314 and 2.

Designated Record at 7.

Mastrandrea contends that the indictment led him to believe that he had been charged under the second

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[2]Five other counts of the indictment, including one count of mail fraud, one count of wire fraud, and three additional counts of interstate transportation of stolen property, were dismissed without prejudice before trial.

paragraph of section 2314,[3] which he argues requires proof that the transportation in interstate commerce was necessary to a scheme to defraud. He bases this argument on the indictment's use of the words "for the purpose of executing the aforesaid scheme and artifice to defraud, did knowingly cause to be transported in interstate commerce." In rejecting this argument, the district court denied Mastrandrea's motion for acquittal at the close of the government's case and refused to instruct the jury as he requested. On appeal, Mastrandrea contends that the

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[3]Section 2314, which does not contain separately numbered paragraphs, provides:

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $5,000 or more; or
>
> . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. 2314

indictment failed to give him adequate notice of the charges against him so that he could prepare his defense. The government disagrees and argues that he was indicted under the first paragraph of section 2314 and that the extra language was merely surplusage.

The Supreme Court has held that independent and unnecessary allegations in an indictment may be ignored and do not constitute an amendment rendering the indictment void. United States v. Miller, 471 U.S. 130, 144 (1985). An indictment is considered sufficient if "it fairly informs the accused of the charges against him to plead double jeopardy as a bar to future prosecution." United States v. Helmel, 769 F.2d 1036, 1322 (8th Cir. 1985)(citing Hamling v. United States, 418 U.S. 87, 117 (1974)). Allegations in an indictment that are not necessary to establish a violation of the statute in issue are mere surplusage and may be disregarded if the remaining allegations are sufficient to charge a crime. United States v. Mohr, 728 F.2d 1132, 1134 (8th Cir.)(in prosecution for misapplication of bank funds, allegation that making loan was concealed from directors by false and misleading reports were mere surplusage and was disregarded), cert. denied, 469 U.S. 843 (1984); United States v. Holmes, 594 F.2d 1167, 1173 (8th Cir.)(in prosecution for being felon in

possession of a firearm, allegation that firearm was knowingly received in violation of the law was mere surplusage and no error in refusing to instruct jury that specific intent required), cert. denied, 444 U.S. 873 (1979). We believe that any unnecessary allegations in the Mastrandrea indictment were mere surplusage.

Mastrandrea argues, however, that the additional allegations prevented him from preparing his defense because he was misled as to the necessary elements of the offense.[4] That is, the focus of his defense was that the fraud ended when he deposited the checks in his account, and the subsequent interstate transportation was not for the purpose of executing a scheme to defraud. In United States v. Kibby, 848 F.2d 920, 923 (8th Cir. 1988), this court held that the interstate commerce requirement is jurisdictional only. Thus, for the purposes of section 2314, the jury did not need to be instructed that the defendant knew the checks, which he had stolen, would be transported

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[4]The government possibly was confused about the statutory provision. Before trial, the government submitted a proposed jury instruction which quoted the language from the second paragraph of section 2314 with an ellipsis replacing the reference to person or persons. Based on its opening statement, the government apparently became aware of the proper provision sometime before trial. The government's apparent confusion, while adding strength to Mastrandrea's argument, does not affect the validity of the indictment.

in interstate commerce. Id. We also note that a scheme to defraud is not mentioned in the first paragraph of section 2314. Clearly, then, the interstate transportation of fraudulently obtained checks for the purpose of executing a scheme to defraud is not an element of the offense, and the inclusion of this language in the indictment does not make it an element of the offense. See United States v. Brown, 604 F.2d 557, 560 (8th Cir. 1979)(extraneous allegations in an indictment need not be proven). Further, Mastrandrea had notice at the time of opening statements that the government was proceeding under paragraph one of section 2314. And, he offers no information on how he might have proceeded differently had the disputed language been omitted.

In addition, the second paragraph of section 2314, which arguably requires the government to prove that the interstate transportation was in furtherance of a scheme to defraud, applies to the interstate transportation of people, not property. See 18 U.S.C. § 2314. Accord H.R. Rep. No. 2474, 84th Cong., 2d Sess., reprinted in 1956 U.S. Code Cong. & Admin. News 3036, 3037-38 (new provision, which became the second paragraph of section 2314, necessary to provide basis for prosecution when victim of confidence game travels in interstate commerce). The illegal

transportation of property is not prohibited by the second paragraph of section 2314. Mastrandrea's argument that he was prejudiced by the surplusage in the indictment is without merit.

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 90-5332MN

United States of America, Appellee, v. Kenneth R. Mastrandrea, Appellant.	* * * * * * * * *	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

The petition for rehearing is also ordered denied.

October 4, 1991

Ordered Entered at the Direction of the Court.

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

United States of America, Plaintiff,

v.

Kenneth Mastrandrea, Defendant.

Criminal File No. 3-89-91

MEMORANDUM AND ORDER

Henry J. Shea, Esq. Assistant United States Attorney, 234 United States Courthouse, 110 South Fourth Street, Minneapolis, MN 55401, for the plaintiff.

Douglas W. Thomson, Esq., Thomson & Ellis, Ltd., Suite 300, 345 St. Peter Street, St. Paul, MN 55102, for the defendant.

The original indictment in this case charged Mastrandrea and a co-defendant, Milton H. Sargent, with one count of wire fraud, in violation of 18 U.S.C. section 1343, one count of mail fraud, in violation of 18 U.S.C. section 1341, and eleven counts of interstate transportation of stolen property, in violation of 18 U.S.C. section 2314.

Immediately prior to trial, the government moved to dismiss without prejudice the wire fraud and mail fraud counts, three of the interstate transportation of stolen property counts, and a portion of one of the remaining counts. The court granted the government's motion. In the instant motion the defendant challenges the remaining counts on the grounds that the government has not, and indeed cannot, prove one of the essential elements of each of the crimes of the charged. Because defendant's motion is based on an erroneous understanding of the essential elements of the crimes charged in the indictment, the court denied the motion for acquittal.

Each of the remaining counts charges that the defendants, on various dates, "each aiding and abetting the other, for the purpose of executing the aforesaid scheme and artifice to defraud, did knowingly cause to be transported in interstate commerce, through normal banking channels" certain checks for amounts that allegedly had been misappropriated from the Carlson Companies, Inc. According to defendant's theory, unless the interstate transportation of funds was for the purpose of executing the scheme to defraud, Mastrandrea cannot be guilty of the offense charges. Defendant relies on case law construing the mail fraud statute, now codified at 18 U.S.C. section

1341. Specifically, defendant cites United States v. Maze, 414 U.S. 395 (1974), and Kann v. United States, 323 U.S. 88 (1944).

In both of these cases the Supreme Court held that, in order to sustain a mail fraud conviction, the government must prove that the mailing furthered a scheme or artifice to defraud. The Court relied on the specific language of the statute, which required that the mailing must be "for the purpose of executing the scheme." Mase, 414 U.S. at 400; Kann, 323 U.S. at 94. Defendant contends that Maze and Kann are controlling because each count of the indictment contains a language similar to that found in the mail fraud statute.

The statute at issue in the case at hand proscribes a number of related offenses. However, the first two provisions are the only portions of section 2314 potentially applicable to Mastrandrea's case. The first paragraph states:

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods wares, merchandise, securities or money, of the value of $5,000 or more

shall be guilty of an offense against the laws of the United States. The second paragraph continues:

> Whoever, having devised or intending to devise any scheme or artifice to defraud ... transports or causes to be transported ... in interstate commerce in the execution or concealment of a scheme or artifice to defraud ... property having value of $5,000 or more

shall be guilty of an offense against the laws of the United States.

The elements of an offense under the first paragraph are well established. The government must prove:

1. That the defendant willfully transported funds in interstate commerce as charged in the indictment;
2. That the funds had a value of at least $5,000;
3. That at the time of transportation the funds had been stolen from the owner; and
4. That at the time the defendant transported the funds he knew that they had been stolen.

Devitt and Blackmar, Federal Jury Practice and Instructions, section 45.13; see Pereira v. United States, 347 U.S. 1, 9 (1954).

Defendant cites no clear precedent which sets forth the elements of an offense under the second paragraph of section 2314. However, relying on the parallel language found in the second paragraph and in the mail fraud statute, defendant asserts that Maze and Kann impose an

additional element. In order to be guilty of the remaining counts, Mastrandrea must have transported the checks in question in interstate commerce for the purpose of executing the scheme or artifice to defraud. Assuming the facts alleged in the indictment to be true, Mastrandrea did not care if the misappropriated funds travelled in interstate commerce. As far as the defendant was concerned, the scheme to defraud had come to fruition as soon as Mastrandrea deposited the checks in his own bank account. The funds were transported in interstate commerce only after the checks had been deposited, when they were drawn on an out-of-state bank in the normal course of business. Therefore, one of the essential elements of the offense is lacking.

Although defendant's argument is logically consistent, it is based on the erroneous assumption that Mastrandrea is charge with a violation of the second paragraph of section 2314. None of the remaining counts specify the portion of section 2314 under which Mastrandrea is charged. However, each count states that "[t]he Grand Jury reallege all of the allegations contained in paragraphs 1 through 17" of the indictment. For purposes of this motion, paragraphs 7-9 are particularly important. Paragraph 7 alleges that the defendants "did willfully and knowingly

devise a-scheme and artifice to defraud and obtain money by means of false and fraudulent pretenses and representations from Carlson Companies, Inc..." Paragraphs 8 and 9 allege that as part of the scheme and artifice to defraud "the defendant, without authority from Carlson Companies, Inc., prepared various checks made payable to themselves as a means of obtaining funds under the control and custody of Carlson Companies, Inc.," and that "once the checks were prepared and signed, the checks would be deposited into the defendants' personal bank accounts." The language of these allegations easily fits within the elements of a section 2314, paragraph one offense.

The purpose of an indictment is to put a defendant on notice of the offenses with which he is charged. At no time prior to trial did Mastrandrea complain that the indictment was ambiguous or confusing. The indictment clearly describes the course of conduct alleged to be criminal. It also identifies the statute that prohibits the conduct in question. Regardless of whether Mastrandrea had been prosecuted under the first or second paragraph of section 2314, the government would have been required to prove the four essential elements set forth in Devitt and Blackmar section 45.13.

To the extent that any confusion has arisen, it is the result of the government's motion on the eve of trial to dismiss without prejudice the wire and mail fraud counts. Both the wire and mail fraud statutes require that the wire transfer or mailing occur for the purpose of executing or concealing the scheme or artifice to defraud. Once the wire and mail fraud counts were dismissed, this language became unnecessary. As the Eighth Circuit stated in United States v. Brown, 604 F. 2d. 557, 560 (8th Cir. 1979), "[a]llegations not essential to prove the crime for which the defendant is charged are mere surplusage and need not be proved or embodied in the instructions to the jury." See also Milentz v. United States, 446 F. 2d 111, 114 (8th Cir. 1971).

The court finds that the language of the indictment regarding the purpose of the interstate transfer of funds is not essential to prove the crime for which Mastrandrea has been charged. Therefore, it will not serve as grounds for a judgment of acquittal, nor will it be included in the instructions to the jury.

Accordingly, IT IS HEREBY ORDERED that defendant's motion for a judgment of acquittal is DENIED.

Dated: January 17, 1990

Paul A. Magnuson

United States District Court Judge

APPENDIX D

JURY INSTRUCTION NO. 19

Counts I through XI of the Indictment charge that Kenneth R. Mastrandrea and Milton H. Sargent, each aiding and abetting the other, caused to be transported in interstate commerce, through normal banking channels, certain checks constituting stolen funds, in violation of Title 18, United States Code, Sections 2314 and 2.

Section 2314 provides in relevant part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported . . . in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $5,000 or more . . . shall be [guilty of an offense against the laws of the United States.]